

TECHNICAL AMENDMENT
May 4, 2018

405 KAR 12:020. Enforcement.

RELATES TO: KRS 350.020, 350.028, 350.050, 350.085, 350.113, 350.130, 350.151, 350.465, 350.990, 30 C.F.R. Parts 730-733, 735, 840.13-.14, 840.16, 843, 30 U.S.C. 1253, 1255, 1271

STATUTORY AUTHORITY: KRS 350.020, 350.028, 350.050, 350.130, 350.465

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 350 authorizes the cabinet to promulgate administrative regulations to control the injurious effects of surface coal mining and reclamation operations. This administrative regulation establishes the conditions for issuance and general form of various kinds of notices and orders to be issued by the cabinet, procedures for an informal hearing, and suspension and revocation requirements.

Section 1. General. (1) The secretary of the cabinet may designate authorized representatives to perform duties pursuant to the administrative regulations contained in 405 KAR Chapters 7 through 24.

(2) Subject to 405 KAR Chapters 7 through 24 or unless the secretary has made a written order contrary to the terms of this subsection, personnel authorized by the commissioner of the department shall be authorized representatives of the cabinet for the purposes of Sections 2, 3, and 4 of this administrative regulation.

Section 2. Notice of Noncompliance and Order for Remedial Measures. (1) Issuance. An authorized representative of the cabinet shall issue a notice of noncompliance and order for remedial measures if, on the basis of inspection, he finds a violation of:

- (a) KRS Chapter 350;
- (b) 405 KAR Chapters 7 through 24;
- (c) A term or condition of a permit;
- (d) A term or condition of approval (for coal exploration and reclamation operations requiring cabinet approval); or
- (e) Any other applicable requirement.

(2) Form and content. A notice of noncompliance and order for remedial measures issued pursuant to this section shall be in writing and shall be signed by the authorized representative of the cabinet who issued it. The notice shall establish with reasonable specificity:

- (a) The nature of the violation;
- (b) The remedial action required, if any, which may include accomplishment of interim steps if appropriate;
- (c) A reasonable time for remedial action, if any, which may include time for accomplishment of interim steps if appropriate; and
- (d) A reasonable description of the portions of the surface coal mining and reclamation operations or coal exploration and reclamation operations to which the notice applies.

(3) Service. Service of a notice of noncompliance and order for remedial measures shall be in the manner established in Section 5 of this administrative regulation.

(4) Extension. An authorized representative of the cabinet may, by written notice, extend the time set for remedial action or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by lack of diligence on the part of the person to whom the notice of noncompliance and order for remedial measures was issued.

(a)1. The total time for remedial action under the notice, including all extensions, shall not

exceed ninety (90) days from the date of issuance of the notice except upon a showing by the permittee or the person conducting the coal exploration and reclamation operations that it is not feasible to abate the violation within ninety (90) calendar days due to one (1) or more of the circumstances established in paragraph (b) of this subsection.

2. An abatement period exceeding ninety (90) days pursuant to this subsection shall not be granted for situations in which the permittee's failure or the failure of the person conducting the coal exploration and reclamation operations to abate within ninety (90) days has been caused by a lack of diligence or intentional delay by the permittee or the person conducting the coal exploration and reclamation operations in completing the remedial action required.

(b) The following circumstances may qualify surface coal mining and reclamation operations or coal exploration and reclamation operations for an abatement period of more than ninety (90) days:

1. The permittee of the ongoing surface coal mining and reclamation operations or the person conducting the coal exploration and reclamation operations has timely applied for and diligently pursued a permit renewal or other necessary approval of designs or plans, but the permit or approval, for reasons not within the control of the permittee or the person conducting the coal exploration and reclamation operations, has not been and will not be issued prior to ninety (90) days after the valid permit or approval expires or is required;

2. There is a valid judicial order precluding abatement within ninety (90) days to which the permittee or the person conducting the coal exploration and reclamation operations has diligently pursued all rights of appeal and to which he has no other effective legal remedy;

3. The permittee or the person conducting the coal exploration and reclamation operations cannot abate within ninety (90) days due to a labor strike; or

4. If climatic conditions preclude abatement within ninety (90) days, or if, due to climatic conditions, abatement within ninety (90) days clearly:

a. Would cause more environmental harm than it would prevent; or

b. Requires action that would violate safety standards established by statute or regulation under the Mine Safety and Health Act, 30 U.S.C. 801 through 965.

(c) If an abatement period in excess of ninety (90) days is approved by the cabinet, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public and the environment.

(d)1. If any of the conditions in paragraph (b) of this subsection exist, the permittee or the person conducting the coal exploration and reclamation operations may request the authorized representative of the cabinet to grant an abatement period exceeding ninety (90) days.

2. The authorized representative of the cabinet shall not grant an abatement period without the approval of the Director of the Division of Mine Reclamation and Enforcement or his designee, and the abatement period granted shall not exceed the shortest possible time necessary to abate the violation.

3. The permittee or the person conducting the coal exploration and reclamation operations shall have the burden of establishing by clear and convincing proof that he is entitled to an extension under the provisions of this subsection. In determining whether or not to grant an abatement period exceeding ninety (90) days, the authorized representative of the cabinet may consider relevant written or oral information from the permittee, the person conducting the coal exploration and reclamation operations, and other sources. The authorized representative of the cabinet shall promptly and fully document in the applicable file his recommendation and reasons for granting or denying the request.

4. The authorized representative's immediate supervisor shall review this document before approving or disapproving the extended abatement period and shall promptly and fully document the reasons for his approval or disapproval in the applicable file.

(e) A determination made pursuant to paragraph (d) of this subsection shall be in writing and shall be subject to administrative and judicial review pursuant to 400 KAR 1:110~~[405 KAR 7:092]~~.

(f) An extension granted pursuant to this subsection shall not exceed ninety (90) days in length. In situations in which the condition or circumstance that prevented abatement within ninety (90) days exists at the expiration of the extension, the permittee or the person conducting the coal exploration and reclamation operations may request a further extension in accordance with the procedures of this subsection.

(5) Modification. An authorized representative of the cabinet may, by written notice, modify an order for remedial measures for good cause, including correction of errors, changes in responsible parties, changes to remedial measures, and changes in abatement dates.

(6) Termination. An authorized representative of the cabinet shall, by issuance of a notice of inspection of noncompliance, provide written notice to the person to whom a notice of noncompliance and order for remedial measures has been issued that the notice is terminated when the authorized representative of the cabinet determines that all violations listed therein have been corrected. The termination shall not affect the right of the cabinet to assess civil penalties for those violations pursuant to 400 KAR 1:110~~[405 KAR 7:092]~~ or to impose other applicable sanctions as authorized by law.

(7) Vacation. Based upon the written recommendation of the regional administrator and the authorized representative of the cabinet who issued the notice of noncompliance and order for remedial measures, the Director of the Division of Mine Reclamation and Enforcement may vacate a notice of noncompliance and order for remedial measures determined to have been issued in error.

Section 3. Order for Cessation and Immediate Compliance. (1) Issuance.

(a) If the person to whom a notice of noncompliance and order for remedial measures has been issued fails to comply with the terms of the notice within the time for remedial action established in the notice or as subsequently extended, an authorized representative of the cabinet shall immediately issue to the person an order for cessation and immediate compliance.

(b) An authorized representative of the cabinet shall immediately issue an order for cessation and immediate compliance if he finds, on the basis of an inspection, a condition or practice; a violation of KRS Chapter 350; a violation of 405 KAR Chapters 7 through 24; or a violation of a term or condition of the applicable permit or exploration approval that:

1. Creates an imminent danger to the health or safety of the public; or
2. Is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

(c) An authorized representative of the cabinet shall immediately issue an order for a cessation and immediate compliance if he finds, on the basis of an inspection, that surface coal mining and reclamation operations are being conducted by a person without a valid surface coal mining and reclamation operations permit for the activities or that coal exploration and reclamation operations are being conducted without proper notice of intention to explore or approval for the operations, as applicable, in accordance with 405 KAR 8:020.

(2) Form and content.

(a) An order for cessation and immediate compliance shall be in writing and shall be signed by the authorized representative of the cabinet who issued it. The order shall set forth with reasonable specificity:

1. The nature of the violation;
2. A reasonable description of the portions of the operations in which it applies;
3. The remedial measures, if any, necessary to abate the violation in the most expeditious

manner possible; and

4. The time established for abatement, if appropriate, including the time for complying with interim steps.

(b) At the same time that the authorized representative of the cabinet issues an order for cessation and immediate compliance pursuant to subsection (1)(b) or (c) of this section, he shall also issue a notice of noncompliance and order for remedial measures.

(3) Service. Service of an order for cessation and immediate compliance shall be in the manner established in Section 5 of this administrative regulation.

(4) Effect.

(a) The order for cessation and immediate compliance shall require the cessation of:

1. All surface coal mining and reclamation operations;

2. All coal exploration and reclamation operations; or

3. The portions or operations relevant to the condition, practice, or violation covered by the order.

(b) The order shall require the person to whom it is issued to take affirmative steps necessary to abate the condition, practice, or violation in the most expeditious manner possible. The order may require the use of existing or additional personnel and equipment.

(c) The order shall remain in effect until the condition, practice, or violation has been abated; until the order is vacated, modified, or terminated in writing pursuant to subsection (5) of this section; until it is vacated, modified, or terminated by a hearing officer pursuant to 400 KAR 1:110~~[405 KAR 7:092]~~; or until the order expires pursuant to Section 6 of this administrative regulation.

(d) Reclamation operations and other activities intended to protect public health and safety and the environment shall continue during the period of an order unless the order states that the reclamation operations and other activities shall cease.

(5) Modification, extension, vacation, and termination.

(a) An authorized representative of the cabinet may, by written notice, modify or terminate an order for cessation and immediate compliance issued under this section for good cause and may extend the time for abatement if the failure to abate within the time previously set was not caused by lack of diligence on the part of the person to whom it was issued.

(b) The secretary or his authorized representative shall terminate an order for cessation and immediate compliance, by written notice to the person to whom the order was issued, when he determines that all conditions, practices, and violations listed in the order have been abated. Termination shall not affect the right of the cabinet to assess civil penalties for those violations under 400 KAR 1:110~~[405 KAR 7:092]~~ or to impose other applicable sanctions as authorized by law.

(c) Based upon the written recommendations of the regional administrator and the authorized representative of the cabinet who issued the order for cessation and immediate compliance, the Director of the Division Mine Reclamation and Enforcement may vacate an order for cessation and immediate compliance determined to have been issued in error.

(6) Within sixty (60) days after issuing an order for cessation and immediate compliance, the cabinet shall notify in writing a person who has been identified under 405 KAR 8:010, Section 18(5) and either 405 KAR 8:030, Section 2(3) and (4) or 8:040, Section 2(3) and (4) as owning or controlling the permittee, that the cessation order was issued and that the person has been identified as an owner or controller.

Section 4. Notice of Inspection and Noncompliance. (1) Issuance. If an authorized representative of the cabinet issues a notice of noncompliance and order for remedial measures or an order for cessation and immediate compliance, he shall reinspect the areas affected by the

surface coal mining and reclamation operations or the coal exploration and reclamation operations on or soon after the date given in the notice or order for completion of remedial measures. When reinspection occurs, the authorized representative of the cabinet shall issue a notice of inspection of noncompliance.

(2) Form and content. The notice of inspection of noncompliance shall establish if:

(a) The remedial measures have been completed and the notice or order is therefore terminated;

(b) The remedial measures have not been completed, but the notice or order is modified or extended for good cause, pursuant to Sections 2(4) and 2(5) of this administrative regulation; or

(c) The remedial measures have not been completed. Following this determination, the cabinet shall:

1. For the situations in which the inspection was a reinspection of a notice of noncompliance and order for remedial measures, issue an order for cessation and immediate compliance; and

2. For situations in which the inspection was a reinspection of an order for cessation and immediate compliance and if the order for cessation and immediate compliance has not been abated, initiate an administrative hearing for suspension or revocation of the permit or approval, initiate an administrative hearing for bond forfeiture, or initiate administrative hearings for other appropriate relief.

(3) Service. Service of a notice of inspection for noncompliance shall be in the manner established in Section 5 of this administrative regulation.

Section 5. Service of Notices and Orders. (1) A notice of noncompliance and order for remedial measures, order for cessation and immediate compliance, or notice of inspection of noncompliance shall be promptly served on the person to whom it is issued or the person's designated agent.

(2)(a) Each notice of noncompliance and order for remedial measures, order for cessation and immediate compliance, and notice of inspection of noncompliance shall be served by:

1. Hand;

2. Certified mail (return receipt requested);

3. Registered mail; or

4. Electronic mail.

(b) The notice or order shall also be served by hand to the individual who, based upon reasonable inquiry by the authorized representative, appears to be in charge at the site of the surface coal mining and reclamation operations or coal exploration and reclamation operations referred to in the notice or order.

(c) If this individual cannot be located at the site, a copy of the notice or order may be tendered to an individual at the site who appears to be an employee or agent of the person to whom the notice or order has been issued.

(3) Service, whether by hand, electronic mail or by mail, shall be complete upon tender of the notice or order and shall not be incomplete because of refusal to accept.

(a) For surface coal mining and reclamation operations, service by electronic mail or mail shall be addressed to the designated agent for service; to the permanent or electronic address of the permittee as identified on the permit or in the application; or, if no address is identified for the permittee in the application, to an other address as is known to the cabinet.

(b) For coal exploration and reclamation operations, service by electronic mail or mail shall be addressed to the designated agent for service; to the permanent or electronic address of the person conducting the coal exploration and reclamation operations as identified in the notice of intention to explore or in the application for coal exploration and reclamation approval

submitted pursuant to 405 KAR 8:020; or, if no address is identified for the person conducting the coal exploration and reclamation operations in the notice or the application submitted pursuant to 405 KAR 8:020, to an other address as is known to the cabinet.

(c) If no person is present at the site of the surface coal mining and reclamation operations or the coal exploration and reclamation operations, service by electronic mail or mail shall by itself be sufficient notice.

(4) Designation by a person of an agent for service of notices and orders issued pursuant to this administrative regulation and notices of hearing issued pursuant to 400 KAR 1:110~~[405 KAR 7:092]~~ shall be made a part of the applicable permit application, notice of intention to explore, or application for coal exploration and reclamation approval. The person shall continue as agent for service of process until written revision of the permit, a notice of intention to explore, or coal exploration and reclamation approval is made that designates another person as agent.

(5) The cabinet may furnish copies of notices and orders to a person having an interest that is or may be adversely affected by the coal exploration and reclamation operations or by the surface coal mining and reclamation operations and a person having an interest in the permit or exploration area.

Section 6. Expiration. (1)(a) Except as provided in subsection (2) of this section, if a notice of noncompliance and order for remedial measures or an order for cessation and immediate compliance requires cessation of coal removal expressly or by implication:

1. The notice or order shall expire thirty (30) days after it is served unless an informal hearing is held at or near the mine site or the exploration site within that time.

2. Notices or orders shall not expire if:

a. The condition, practice, or violation in question has been abated; or

b. The person to whom the notice or order has been issued has waived the informal hearing or has agreed to its postponement.

(b) Expiration of the notice or order shall not affect the rights of the cabinet to assess penalties and to impose sanctions, in accordance with KRS 350.028, 350.050, 350.053, 350.085, 350.130, 350.465, and 350.990, with respect to the time period during which the notice or order was in effect for the violations for which the notice or order was issued. The granting or waiver of an informal public hearing shall not affect the right of a person to an administrative hearing.

(2)(a) The informal public hearing shall be waived if the person to whom the notice or order was issued is informed by written notice served in the manner provided in paragraph (b) of this subsection that he shall be deemed to have waived an informal public hearing unless the hearing is requested within thirty (30) days after service of the notice, and an informal public hearing is not requested within that time.

(b) The written notice referred to in paragraph (a) of this subsection shall be delivered by an authorized representative or sent by certified mail, return receipt requested, no later than five (5) days after the notice or order is served.

(c) The person to whom the notice or order is issued shall be deemed to have consented to an extension of the time for holding the informal public hearing if the request is received on or after the 21st day after service of the notice or order. The extension of time shall be equal to the number of days elapsed after the 21st day.

(3)(a) The cabinet shall give as much advance notice as is practicable of the time, place, and subject matter of the informal public hearing to the person to whom the notice or order was issued, and the person who filed a report that led to the issuance of the notice or order.

(b) The cabinet shall also post notice of the informal public hearing at the department's re-

gional office for the mine site and, if practicable, publish it in a newspaper of general circulation in the area of the mine.

(4) Requirements for administrative hearings shall not govern informal public hearings. An informal public hearing shall be conducted by a representative of the cabinet who shall accept oral or written arguments and other relevant information from a person attending.

(5) Within five (5) days after the close of the informal public hearing, the cabinet shall affirm, modify, or vacate in writing the notice or order. The decision shall be sent to the person to whom the notice or order was issued, and a person who filed a report that led to the issuance of the notice or order.

(6) The person conducting the informal public hearing for the cabinet shall determine if the mine site shall be viewed during the informal public hearing. In making this determination the only consideration shall be if viewing the mine site will assist the person conducting the informal public hearing in reviewing the appropriateness of the enforcement action or of the required remedial action.

Section 7. Suspension and Revocation of Permits and Exploration Approvals. (1) The cabinet may initiate:

(a) Administrative hearings for suspension or revocation of permits, coal exploration, and reclamation approvals;

(b) Administrative hearings for bond forfeitures; and

(c) Administrative hearings or judicial proceedings for other appropriate relief.

(2) If the cabinet revokes or suspends the permit or exploration approval, surface coal mining operations on the permit area or disturbances on the exploration area shall immediately cease, and the permittee or person conducting coal exploration operations shall:

(a) Complete reclamation within the time specified in the order, if the permit or exploration approval is revoked; or

(b) Complete all affirmative obligations to abate all conditions, practices, and violations as specified in the order, if the permit or exploration approval is suspended.

Section 8. Pattern of Violations. (1) If the cabinet determines that a pattern of violations of the requirements of KRS Chapter 350, the administrative regulations, or a permit condition imposed under KRS Chapter 350 or administrative regulations exists or has existed and that the violations are caused by the unwarranted failure of the permittee or were willful violations, the cabinet shall issue an order to the permittee to show cause why the permit should not be suspended or revoked.

(2) The cabinet may determine that a pattern of violations exists or has existed, based on two (2) or more inspections of the permit area within any twelve (12) month period, after considering the circumstances, including:

(a) The number of violations, cited on more than one (1) occasion, of the same or related requirements of KRS Chapter 350; 405 KAR Chapters 7 through 24; or permit conditions;

(b) The number of violations, cited on more than one (1) occasion, of different requirements of KRS Chapter 350; 405 KAR Chapters 7 through 24; or permit conditions; and

(c) The extent to which the violations were isolated departures from lawful conduct.

(3) The cabinet shall promptly review the history of violations of a permittee who has been cited for violations of the same or related requirements of KRS Chapter 350; 405 KAR Chapters 7 through 24 or permit conditions during three (3) or more inspections of the permit area within any twelve (12) month period. If after the review the cabinet determines that a pattern of violations exists or has existed, the cabinet shall issue a show cause order pursuant to this section and 400 KAR 1:110~~[405 KAR 7:092]~~, Section 10.

(4) In determining the number of violations within any twelve (12) month period, the cabinet shall only consider violations cited as a result of inspections carried out on or after May 3, 1978.

(5) If a permittee fails to abate a violation cited in a notice of noncompliance or cessation order within the abatement period established in the notice of order or as subsequently extended, then the cabinet shall review the permittee's history of violations to determine if a pattern of violations exists or has existed pursuant to this section and shall initiate a show cause order as provided in this section and 400 KAR 1:110~~[405 KAR 7:092]~~, Section 10.

Section 9. Inability to Comply. (1) A notice or order issued pursuant to Title 405 of the Kentucky administrative regulations shall not be vacated because of inability to comply.

(2) Inability to comply shall not be considered in determining if a pattern of violations exists.

(3) Rapid compliance, good faith, diligence, and inability to comply may be considered in mitigation of proposed penalty assessments in accordance with 400 KAR 1:110~~[405 KAR 7:092]~~. (8 Ky.R. 1523; eff. 1-6-1983; 11 Ky.R. 1833; 12 Ky.R. 184; eff. 8-13-1985; 17 Ky.R. 2826; eff. 5-22-1991; 19 Ky.R. 477; 939; eff. 11-23-1992; 38 Ky.R. 674; 1003; 1311; eff. 2-3-2012; TAm eff. 5-4-2018.)